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IN THE

Supreme Court of the United States

October Term 1973
No. 73-674

SAFE-FLIGHT INSTRUMENT CORPORATION,
Petitioner,

vs.

McDONNELL DOUGLAS CORPORATION and SPERRY RAND CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF IN OPPOSITION.

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SUBJECT INDEX

	Page
Questions Presented	1
Supplemental Statement of the Case	3
Reasons for Denying Writ	7
1. The Decisions by the Lower Courts Are in Accord With Applicable Decisions of This Court	7
2. There Are No Special or Important Questions Which Have Not Been Settled by This Court	8
3. There Is No Conflict of Decisions	8
Argument	9
A. Petitioner's Position and Relief Sought Is Directly Contrary to the Decision in Blonder-Tongue and to Due Process	9
B. There Are No Conflicting Circuit Court Decisions Interpreting Blonder-Tongue Under the Circumstances of This Case	13
C. The Lower Courts Accorded the Prior Decision of Validity the Respectful Consideration to Which It Was Entitled	15
D. Petitioner's Requested Relief Is Contrary to the Public Interest	17
E. Petitioner's View of the Circuit Court's Function Would Abrogate the Circuit Court's Power of Review	19
Conclusion	20

TABLE OF AUTHORITIES CITED

Cases	Page
Bernhard v. Bank of America N.T. & S.A., 19 Cal. 2d 807, 122 P.2d 892 (1942)	10, 12
Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971)	2, 8, 9, 10, 11, 12, 13, 14, 15
Bloutell v. Volk, 449 F.2d 673 (10th Cir. 1971)	14
Business Forms Finishing Service, Inc. v. Carson, 452 F.2d 70 (7th Cir. 1971)	15
Filtrol Corporation v. Kelleher, 467 F.2d 242 (9th Cir. 1972), cert. denied, 409 U.S. 1110	13, 14
Hurley v. Southern California Edison Co., 183 F. 2d 125 (9th Cir. 1950)	11
Lear, Inc. v. Adkins, 395 U.S. 653 (1969)	18
Massillon-Cleveland-Akron S. Co. v. Golden State Adv. Co., 444 F.2d 425 (1971) cert. den., 404 U.S. 873 (1971), rehear. denied, 404 U.S. 961 (1971)	20
Mast, Foos & Co. v. Stover Mfg. Co., 177 U.S. 485 (1889)	16
Reeves Instrument Corp. v. Beckman Instrument, Inc., 444 F.2d 263 (9th Cir. 1971) cert. den. 404 U.S. 951 (1971)	19
Regimbal v. Scymansky, 444 F.2d 333 (9th Cir. 1971)	19
Technograph Printed Cir. v. Packard Bell Electronics Corp., 290 F.Supp. 308 (C.D. Cal. 1968) (fn. 8)	15
Triplett v. Lowell, 297 U.S. 638 (1936)	9, 11, 13

Page

United States v. United Air Lines, Inc., 216 F. Supp. 709 (D. Nev. 1962) mod. 335 F.2d 379 (9th Cir. 1964), pet. for cert. dismissed 379 U.S. 951 (1964) 11

Rules

Rules of Court, Rule 19(1)(b) 7

Statutes

United States Code, Title 35, Sec. 102 3

United States Code, Title 35, Sec. 103 .....2, 3, 4

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BRIEF IN OPPOSITION.

Questions Presented.

Petitioner has framed some of the Questions Presented in the petition in terms of premises which are not supported by the record in this case and which are in some instances directly contrary to the record. Consequently, respondents are dissatisfied with such presentation of the Questions Presented (Pet. pp. 2-3)*

*The following abbreviations will be used throughout this brief:
Pet. p. ....: The Petition for Writ of Certiorari
App. p. ....: The Appendix to the Petition for Writ of Certiorari
TR. ....: The Transcript of Record
Court of Appeals: United States Court of Appeals for the Ninth Circuit
District Court or
California District Court: United States District Court for the Central District of California
'540 patent: U.S. Patent No. 3,043,540 in suit.

and have reframed those questions to be consistent with the record in this case.

The Questions Presented by the petition are:

1. Whether the Court of Appeals erred in holding that a prior adjudication of patent validity did not, absent estoppel running against the defendants accused of infringement in subsequent litigation, supplant the duty of the subsequent court to adhere to the rules and criteria of this Court in determining that the '540 patent claims are invalid under 35 U.S.C. §103 where due respect was accorded the prior decision.

2. Whether the Court of Appeals erred, under the principles of *Blonder Tongue*[1] by not estopping defendants, who were not shown to have appeared in, or been otherwise estopped by, a prior action in which the 540 patent was held valid, from litigating the issue of validity of that patent in a subsequent action in which they were alleged to infringe that patent?

3. Whether the Court of Appeals erred in determining the soundness of the findings of the United States District Court for the Central District of California, in the only appeal before them, by consideration of the evidence received in the trial of the appealed California District Court case, rather than determining the issue of validity on the basis urged by petitioner, in which the record of an unappealed case in the United States District Court for the Western District of Washington finding the patent valid would be compared to that of the appealed case in the California District Court in which the patent was held to be invalid.

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[1]*Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971).

Respondents believe that the above questions should be answered in the negative and that they present no question upon which certiorari should be granted.

Supplemental Statement of the Case.

Petitioner's statement of the case is in most respects factually accurate but does contain meaningful omissions or inaccuracies based upon misinterpretation, misreading or misstatement of the lower Courts' decisions.

In Civil Action No. 68-2129-WPG filed in the District Court for the Central District of California on December 31, 1968, Safe-Flight Instrument Corporation (hereinafter referred to as "petitioner" or "Safe-Flight") charged the respondents, McDonnell Douglas Corporation and Sperry Rand Corporation (hereinafter referred to collectively as "respondents or defendants" and individually as "Douglas" and "Sperry," respectively) with infringement of the '540 patent.

The device of the '540 patent is a combination of old and well known elements utilized as an aircraft control system for providing an indication which may be employed during take-off, landing approach, go-around and other flight modes (Fs.F Nos. 9 & 11, App. p. A-20). The alleged infringement was by reason of Sperry's manufacture of the Automatic Throttle/Speed Control System (referred to as the "AT/SC system") for the DC-10 aircraft then being built by Douglas.

The California District Court entered its judgment declaring all of the claims in issue of the '540 patent to be invalid under 35 U.S.C. §103 and some of the claims to be invalid also under 35 U.S.C. §102. Additionally, the District Court adjudged that the Sperry

AT/SC system did not infringe the '540 patent even if valid (App. p. A-35). SafeFlight appealed from that judgment to the Court of Appeals for the Ninth Circuit in Appeal No. 71-1751. The Court of Appeals affirmed on the basis that the District Court's findings of fact were not clearly erroneous and that the District Court followed the mandates of this Court in determining the issue of patent validity under 35 U.S.C. §103 (App. p. A-11).

A suit by the patentee against United Control Corporation in the United States District Court for the Western District of Washington for infringement by United Control Corporation of the '540 patent had been terminated, prior to trial in the California case, by payment to Safe-Flight of $2,509,922.19 by United Control Corporation and entry of a final consent judgment of validity of the '540 patent and two other patents in the Washington District Court (App. p. A-56). Accordingly, the only appeal before the Court of Appeals was from the decision of the California District Court in Case No. 68-2129 WPG (App. p. A-8). The Court of Appeals found that the District Court had accorded the prior litigation the weight to which it was entitled (App. pp. A-7, 8).

Petitioner's Questions Presented and Statement of the Case include "facts" either not supported by the record or contrary to the facts as found by the District Court and the Court of Appeals. Although respondents do not wish to argue, again, the facts of the case, respondents feel constrained by reason of the petition to

comment upon some of such "facts" or allegations made by petitioner. For example, in the petitioner's Questions Presented (Pet. p. 3), petitioner states that Douglas "fostered infringement" by Sperry; in petitioner's Statement of the Case, petitioner sets out that Douglas specified to Sperry an aircraft instrument "which called for infringement of Petitioner's '540 patent" (Pet. p. 5), and throughout petitioner's argument (*e.g.* Pet. p. 10) petitioner states that Douglas "procured" infringement by Sperry. This is directly contrary to the Findings of Fact, Conclusions of Law and Judgment of the District Court which found no infringement on a number of bases, and adjudged that "Even if valid, Defendant Sperry has not infringed, and does not infringe said Letters Patent" (App. p. A-39). This judgment was affirmed by the Court of Appeals (App. p. A-2).

Similarly, petitioner states at various parts of the petition and specifically in the fourth Question Presented that the patent was "the subject of two (2) identical trials" and that there was "identical evidence" (Pet. p. 4). There was no finding in either lower Court to that effect and on this point the Court of Appeals commented as follows at Appendix, page A-8:

> "The parties have argued pro and con as to the differences between the evidence in the two records, but we have no basis for evaluating their differing appraisals. We have accordingly determined the soundness of the findings of fact in the instant case as measured by Rule 52(a), by a consideration of the evidence received in this trial."

Petitioner's statement at petition, page 7 of the reasons for affirming the denial of petitioner's Motion for Summary Judgment on Count 3 against Douglas, but not Sperry, for infringement by reason of the DC-9 is inaccurate. The Court of Appeals held that:

> "The district court did not deny the motion because it was convinced that the motion was without merit, but because the issue presented was so complicated the court did not wish to dispose of it on a motion for partial summary judgment. In effect, the denial was without prejudice. Under the circumstances we believe this was a judicious way to deal with the matter" (App. p. A-13).

Additionally, as at petition, page 7, petitioner asserts that the patent is valid in one count against Douglas in the California action, although it was specifically determined by the District Court that the '540 patent was invalid in all of the counts in which the validity of that patent was at issue. The Court of Appeals affirmed stating:

> "As noted above, the trial was had only with regard to the validity of the '540 patent (at issue in counts one, two and three), and infringement of that patent by the Sperry AT/SC system (at issue only in counts one and two). These issues were decided adversely to Safe Flight." (App. p. A-12).

Accordingly, contrary to the statement of the case by the petitioner, the Court of Appeals affirmed that the '540 patent had properly been determined to be invalid and that the '540 patent was not infringed by the Sperry AT/SC device for the DC-10 aircraft of Douglas. The Court of Appeals found also that the

trial court had been judicious in its consideration of the prior Washington Decision.

Reasons for Denying Writ.

There are no special and important reasons stated by petitioner for which this Court should grant the Petition for Review by Writ of Certiorari. No reasons of the character which will be considered by this Court, as enumerated in Rule 19(1)(b), for granting review on Writ of Certiorari from a Circuit Court of Appeals are presented in the instant petition.

Despite petitioner's alleged "reasons" for review, it seems apparent that the District Court's Findings of Fact by which it determined that the '540 patent was invalid and not infringed by respondent Sperry's AT/SC system for Douglas' DC-10 aircraft and the affirmance of those findings by the Court of Appeals are the issue in this case.

The Writ of Certiorari should be denied because:

1. The Decisions by the Lower Courts Are in Accord With Applicable Decisions of This Court.

The issues of the validity of the '540 patent and infringement by Sperry were determined as questions by fact of the District Court and were affirmed by the Court of Appeals as follows at App. p. A-11:

> "What is important, however, is that the district court rigidly adhered to the rules and criteria of the Supreme Court in determining that the questioned patent claims are invalid under 35 U.S.C. §103.
>
> "All of the factual inquiries required under the *Graham* decision, and in *Reeves Instrument Cor-*

poration v. Beckman Instruments, Inc., 444 F.2d 263 (9th Cir. 1971), in order to resolve the obviousness—non-obviousness dichotomy, were made."

2. There Are No Special or Important Questions Which Have Not Been Settled by This Court.

Although petitioner asserts at Pet. pp. 9-10 that the questions petitioner has attempted to raise have not been decided by this Court and that the area of law which petitioner has questioned is "totally unsettled", the opposite in true. The questions through which petitioner attempts to resurrect the '540 patent against defendants by reliance on a previous decision is specifically answered negatively to petitioner's position in *Blonder-Tongue* and in innumerable cases dealing with due process.

3. There Is No Conflict of Decisions.

There is no conflict between the judgments below and the decision by this Court in *Blonder-Tongue*, or in any subsequent decision by any Court of Appeals interpreting *Blonder-Tongue*. In fact, no conflicting cases are cited by petitioner. The decisions by the lower Courts in the instant case follow this Court's decision in *Blonder-Tongue* and this Court's decisions which mandate the factual inquiries to be made in determining patent validity.

ARGUMENT.

A. Petitioner's Position and Relief Sought Is Directly Contrary to the Decision in Blonder-Tongue and to Due Process.

The theory espoused by petitioner that a prior holding of patent validity should preclude, or limit, further litigation by different defendants against such validity is contrary to the express language of this Court in *Blonder-Tongue* and contrary to due process and the established law of *res judicata*. On the basis of the Due Process Clause of the Constitution and the decisional law, the petitioner's questions, as reframed by respondent in this opposition to be consistent with the record in this case, are clearly answerable in the negative.

Petitioner's first four Questions Presented (Pet. pp. 2-3) and Argument (Pet. pp. 10-12) requests this Court to rule that defendants, who have not appeared as a party, privy, or participant, in a prior action in which the '540 patent was held valid, should be estopped from litigating the issue of validity of that patent in a subsequent action in which the defendants are alleged to infringe that same patent. *Blonder-Tongue* did materially alter the effect of prior decisions in patent cases by overruling *Triplett*[2] "to the extent that it forecloses a plea of estoppel by one facing a charge of infringement of a patent that has once been declared invalid" (p. 350), but it did not alter or change the effect of a prior decision of validity upon subsequent, different, defendants. (p. 329).

Contrary to petitioner's comment that the inverse situation where there has been a prior decision of validity

[2] *Triplett v. Lowell*, 297 U.S. 638 (1936).

is a "totally unsettled" area of the law and that this Court must deal with that so-called "other edge of Blonder's 'sword'" (Pet. p. 10), this area of the law applicable to the facts of this case has been settled by this Court and by Courts of Appeals and was specifically dealt with in *Blonder-Tongue*.

The criteria for determining estoppel or *res judicata* were set out with precision and clarity in *Bernhard v. Bank of America*[3] and reiterated in *Blonder-Tongue* at pages 323-324 as follows:

> "Justice Traynor's opinion, handed down the same year the Restatement was published, listed criteria since employed by many courts in many contexts:
>
> 'In determining the validity of a plea of res judicata three questions are pertinent: Was the issue decided in the prior adjudication identical with the one presented in the action is question? Was there a final judgment on the merits? Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?' 19 Cal 2d, at 813, 122 P. 2d, at 895."

The *Bernhard* case was described in *Blonder-Tongue* as "'a shining landmark of progress in justice and law administration'" (p. 349). The interplay between due process and the criteria for determining collateral estoppel or *res judicata* is discussed in *Bernhard* apropos of the present case as follows (pp. 811-812):

> "The criteria for determining who may assert a plea of res judicata differs fundamentally from the criteria for determining against whom a plea

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[3]*Bernhard v. Bank of America N.T. & S.A.*, 19 Cal.2d 807, 122 P.2d 892 (1942).

> of res judicata may be asserted. The requirements of due process of law forbid the assertion of a plea of res judicata against a party unless he was bound by the earlier litigation in which the matter was decided. (citations omitted) He is bound by that litigation only if he has been a party thereto or in privity with a party thereto. There is no compelling reason, however, for requiring that the party asserting the plea of res judicata must have been a party, or in privity with a party, to the earlier litigation."

Contrary to the statement in the petition that petitioner was operating under the strictures of the *Triplett* case, the "strictures" which petitioner was under with respect to collateral estoppel at the time of the trial and after the *Blonder-Tongue* decision were those as stated in the *Bernhard* case of 1942 which was approved, but not applied, in the Ninth Circuit in *Hurley v. So. California Edison Co.*,[4] and applied with a lengthy discussion in *United States v. United Air Lines*[5] in 1962. The position of petitioner with respect to the issue of collateral estoppel results from those prior decisions and similar decisions.

The petitioner asks this Court to ignore or overrule those criteria since employed by many courts in many contexts. The essence of the criteria for collateral estoppel which is applicable to this case is the third question, *i.e.*, "Was the party against whom the plea is asserted a party or in privity with a party to the prior

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[4]*Hurley v. Southern California Edison Co.*, 183 F.2d 125 (9th Cir. 1950).

[5]*United States v. United Air Lines, Inc.*, 216 F.Supp. 709, 726 (D. Nev. 1962) modified 335 F.2d 379 (9th Cir. 1964), pet. for cert. dismissed 379 U.S. 951 (1964).

adjudication?" Since the answer is negative, it would be a clear denial of due process to accept petitioner's position.

To pose its question or advocate its position petitioner must ask this Court to overrule or rewrite *Blonder-Tongue* and overrule those due process cases, such as *Bernhard*, as well as ignore the various comments of this Court in *Blonder-Tongue* setting out the rationale of due process and mutuality which apply to the circumstances of this case as opposed to a case where a patent has once been declared *invalid*. It is the appropriateness and fairness of invoking estoppel against a party who has already litigated an issue once and lost that is the essence of *Blonder-Tongue*.

The circumstances of this case were keynoted by petitioner's counsel at an early preliminary proceeding in the trial court action in which he stated:

> "Mr. Marshall: The excuse I always get is that we [Safe-Flight] tried this case once before, but your honor, this case is different. The infringement is different, the defendants are different, the proof is different. [TR Vol. D. 3/9/70, p. 17]."

The law applicable to these facts was not only not altered by *Blonder-Tongue* but was specifically dealt with by this Court in *Blonder-Tongue* consistently with the foregoing discussion and adversely to petitioner's position in the following language (p. 329):

> "Although neither judges, the parties, nor the adversary system performs perfectly in all cases, the requirement of determining whether the party against whom an estoppel is asserted had a full and fair opportunity to litigate is a most significant safeguard.

> Some litigants—those who never appeared in a prior action—may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position."

In the *Blonder-Tongue* case, this Court has modified the mutuality of estoppel doctrine of *Triplett v. Lowell, supra,* to allow a subsequent defendant in a patent action, where the patent has previously been declared *invalid,* to raise a plea of estoppel on the rationale that the patentee has previously had a full day in court. It is incomprehensible that the petitioner in this action should attempt to twist that decision with simplistic and irrational reasoning by substitution of "valid" for "invalid" in one quotation from the decision to reach a view that defendants in this action should have *no day* in court.

B. There Are No Conflicting Circuit Court Decisions Interpreting Blonder-Tongue Under the Circumstances of This Case.

Petitioner has referred to the "totally unsettled" area of the law since *Blonder-Tongue.* Contrary to petitioner's assertion, various Courts of Appeals have dealt uniformly with the effect of a prior decision of validity since *Blonder-Tongue.*

The Ninth Circuit Court of Appeals dealt with the effect of the *Blonder-Tongue* decision in *Filtrol Cor-*

poration v. Kelleher,[6] in a statement relevant to this case (p. 245):

> "Moreover, the pendency of the Connecticut action does not guarantee that the validity issue will not ultimately have to be tried in the California action. This is because *Blonder-Tongue* will apply only if the issue of validity is decided against Mobil (patentee) in the Connecticut case. If the patents are held valid in that case, petitioners could retry the issue in the California case. Also, if the patents are held invalid in the Connecticut case, Mobil could still attempt to show, in the California case, that it 'did not have "a fair opportunity procedurally, substantively and evidentially to pursue [its] claim the first time" ' in the Connecticut case. *Blonder-Tongue,* supra, 402 U.S. at 333, 91 S. Ct. at 1445." (First parenthetical added).

In *Bloutell v. Volk,*[7] the Court of Appeals for the Tenth Circuit commenting on *Blonder-Tongue* stated on page 678:

> "Neither the actual decision of the Supreme Court nor the language of the opinion suggests that the mutuality requirement is relaxed as to new infringers following an adjudication of validity. To hold so would deprive the alleged infringer of a trial. . . ."
>
> ". . . it is grossly inequitable to bind a party to a judgment of validity rendered in an action against some other party."

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[6] *Filtrol Corporation v. Kelleher,* 467 F.2d 242 (9th Cir. 1972), cert. denied, 409 U.S. 1110.

[7] *Bloutell v. Volk,* 449 F.2d 673 (10th Cir. 1971).

See also *Business Forms Finishing Service, Inc. v. Carson.*[8]

Any other rule would be disastrous since it would encourage a patent holder to seek out a weak infringer in order, hopefully, to obtain an adjudication of validity and then, on the strength of this adjudication, attack more meaningful defendants. This very point was discussed prior to *Blonder-Tongue* in *Technograph Printed Cir. v. Packard Bell Electronics Corp.*,[9] (cited in fn. 5 of *Blonder-Tongue, supra*) in which a plaintiff whose patent had previously been held invalid by another circuit court was collaterally estopped and the Court stated:

> "It is not necessary to reach the question as to whether or not the doctrine would apply if the patent were held valid in a previously adjudicated case, because the considerations would be much different; a defendant in a new case may have made greater research of prior art, or done any one of dozens of things which the previous defendant, either through penury or sheer inability, did not, or could not produce . . ."

C. The Lower Courts Accorded the Prior Decision of Validity the Respectful Consideration to Which It Was Entitled.

The District Court recognized the relevance and persuasiveness of the prior decision in the Washington District Court as evidenced by one exchange between

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[8]*Business Forms Finishing Service, Inc. v. Carson,* 452 F.2d 70 (7th Cir. 1971).

[9]*Technograph Printed Cir. v. Packard Bell Electronics Corp.,* 290 F.Supp. 308 (C.D. Cal. 1968) (fn. 8).

petitioner's counsel and the trial court which occurred as follows at an early stage of the case:

> "THE COURT: Well, as to that I think you are right. I have not had this precise situation before, but my impression is and has been right along that unless and until the Ninth Circuit passes on the validity of the patent, it is my responsibility to do so, and what Judge Goodwin has done up there may be worthy of note and may be somewhat persuasive, but it is certainly not binding upon me, and that I have to determine the validity of the patent in this case.
>
> Now, is that correct, in general or is there argument about that?
>
> . . . .
>
> MR. MARSHALL (Counsel for Safe-Flight): No argument at all, your Honor." [TR Vol. C 9/12/69, p. 6.]

In *Mast, Foos & Co. v. Stover Mfg. Co.*,[10] this Court had before it an appeal from a decision of the Second Circuit finding a patent invalid. The patentee contended that the decision of the Second Circuit was incorrect since the Eighth Circuit had previously found the same patent valid. Not only are the facts comparable to this case, but the trial court's comments set out above are completely consistent with those of this Court as to the effect of comity under those facts as follows (pp. 488-489):

> ". . . Comity persuades; but it does not command. It declares, not how a case shall be decided, but how it may with propriety be decided. It recognizes

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[10]*Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U.S. 485 (1889).

> the fact that the primary duty of every court is to dispose of cases according to the law and the facts; in a word, to decide them right. In doing so, the judge is bound to determine them according to his own convictions. If he be clear in those convictions, he should follow them. It is only in cases where, in his own mind, there may be a doubt as to the soundness of his views that comity comes in play and suggests a uniformity of ruling to avoid confusion, until a higher court has settled the law. It demands of no one that he shall abdicate his individual judgment, . . ."

Based upon the record, the Court of Appeals in considering whether the District Court has accorded the prior Washington District Court decision its proper respectful consideration found that:

> "It is true, as defendants concede, that prior adjudications as to validity of a patient 'are entitled to respectful consideration and in doubtful cases they are strong persuasive.' (citations omitted) . . . the district court, in the case before us, admitted in evidence the judgment, findings of fact and conclusions of law entered in the Seattle case. We have no reason to believe that the district court in our action failed to accord those records of the Seattle case the weight to which they are entitled." (App. p. A-72).

D. Petitioner's Requested Relief Is Contrary to the Public Interest.

It is not the respondents' purpose here to follow the petitioner into philosophical discussions of patents and the effect of their presumptive validity. Such was com-

mented upon by this Court in *Lear v. Adkins*,[11] particularly at page 670. Even if petitioner's position was not so clearly contrary to the law as it has existed and exists today, petitioner's logic with regard to the particular circumstances of this case would be contrary to the statements of this Court and the Courts of Appeals which have made clear that procedural niceties and out-of-place legal theories must yield in patent cases which are by their nature invested with a public interest.

Few patent cases could be more deeply invested with the public interest than the present case in which the accused device is a flight guidance system for Douglas' new passenger aircraft. The District Court found as a result of the trial that:

> "The construction of the Sperry AT/SC system, its mode of operation and computational techniques were conceived by Sperry by building logically upon its own expertise and knowledge of the prior art." (F.F. 46, App. p. A-29).

Consider then the impact upon the public interest if Sperry's expertise was eliminated by a binding effect of the unappealed Washington decision of validity of the '540 patent against United Control Corporation. Defendants with a compelling conviction of the correctness of their position, as in this case, should not be muzzled by a previous decision of validity of a patent which they are subsequently alleged to infringe.

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[11] *Lear, Inc. v. Adkins*, 395 U.S. 653 (1969).

E. Petitioner's View of the Circuit Court's Function Would Abrogate the Circuit Court's Power of Review.

Petitioner, in its fifth Question Presented to this Court, has mingled two distinct questions, one being the alleged nonuniformity of decisions of the District Courts within the circuit on the '540 patent and the other being the alleged lack of uniformity in patent decisions by the Ninth Circuit Court of Appeals. In particular, as to the lack of uniform decisions of the Ninth Circuit, petitioner cites *Reeves Instrument v. Beckman Instrument,*[12] a case where a patent was held valid and *Regimbal v. Scymansky,*[13] a case where a patent was held invalid. In both of these cases, different plaintiffs and defendants were involved and in each case different patents were litigated. Petitioner apparently wishes this Court to consider prior decisions of the circuit, particularly those finding combination patents invalid, in hope that such a consideration would find valid the invalid patent of this litigation.

As to lack of uniformity among District Courts, petitioner argues that its prior unappealed decision of validity on the '540 patent against different defendants results in a nonuniformity of decisions, and should prevent the respondents in this action from having a full trial on the validity of the '540 patent. To so hold, would abrogate appellate authority and require the Court of Appeals to either be bound by a prior District

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[12]*Reeves Instrument Corp. v. Beckman Instrument, Inc.*, 444 F.2d 263 (9th Cir. 1971) cert. den. 404 U.S. 951 (1971).

[13]*Regimbal v. Scymansky*, 444 F.2d 333 (9th Cir. 1971).

Court decision or require the Court of Appeals to resurrect for review a final unappealed judgment and its record, even if that prior judgment (as in this case) was entered by consent. If a Circuit Court is required to maintain uniformity of decisions within its circuit even of those decisions which are unappealed, as the petitioner argues in its fifth question for review, the Court of Appeals may then be required to reverse a final judgment in an unappealed case in order to establish the uniformity suggested by the petitioner. Such a procedure would mean that no decision is final, it would only prolong litigation and never allow a patent validity decision to be put to rest. Such a procedure would substitute symmetry for justice.

Conclusion.

Utilizing the language of the Court of Appeals for the Ninth Circuit in *Massilon v. Golden State Adv. Co.*,[14] the respondents have "shouldered the burden of vindicating the public interest" (p. 428) in the field of United States passenger aircraft where the public interest is of paramount importance. Respectful consideration was given by the lower Courts in this case to a decision holding valid the '540 patent in a prior unappealed action in which respondents never appeared. The District Court and Court of Appeals found the '540 patent to be invalid in this case by adhering to the mandates of this Court in applicable cases. Peti-

[14]*Massillon-Cleveland-Akron S. Co. v. Golden State Adv. Co.*, 444 F.2d 425 (1971) cert. den., 404 U.S. 873 (1971), rehearing denied, 404 U.S. 961 (1971).

tioner should not now be heard in its request that respondents should have had no day in court by reason of that prior action.

Respectfully submitted,

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